In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 287

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE PENNSYLVANIA RAILROAD COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

In the statement making against jurisdiction in the instant case, the appellee has included a motion to dismiss or affirm which is identical in all respects with that filed by the appellees in *United States of America* v. *Midstate Horticultural Company, Inc., and Arpazat Setrakian* (No. 286, present Term). As the issues in the two cases are identical, and the facts differ in no pertinent respect, the Government feels that it is unnecessary to do more in the instant case than to make reference to its brief in opposition to the motion to dismiss or affirm in the *Mid-*

state Horticultural case, which discusses the [illegible] tentions urged by the appellee herein.

For the reasons stated in the Government's [illegible] in opposition to the motion to dismiss or affirm [illegible] the *Midstate Horticultural* case, we respectfully submit that the motion to dismiss or affirm in the present case should be denied.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
HUGH B. COX,
ELMER B. COLLINS,
FRANK COLEMAN,
Special Assistants to the Attorney General.

AUGUST 1938.

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BRIEF FOR THE UNITED STATES

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Miscellaneous:	
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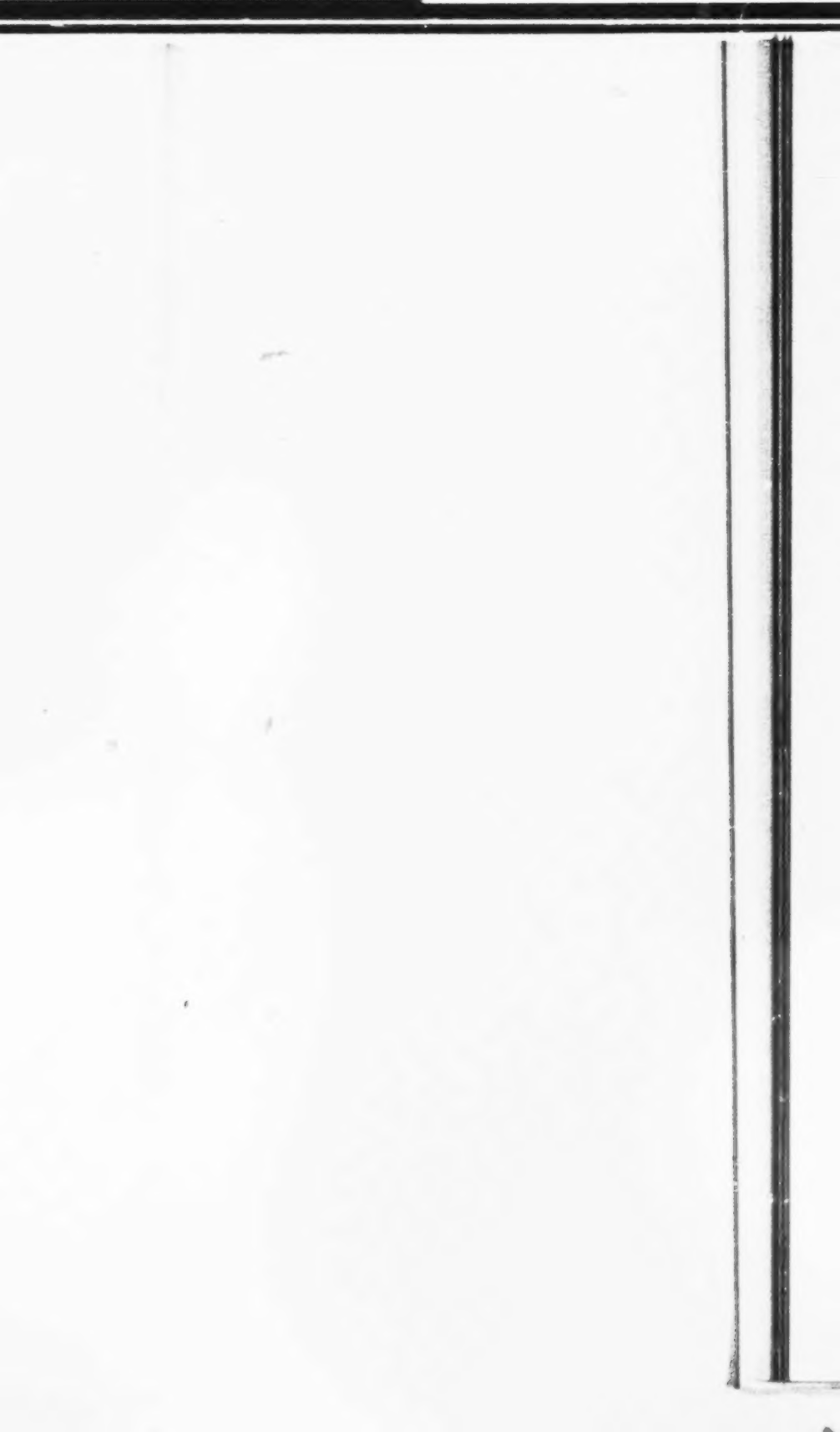

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OPINION BELOW

The opinion of the District Court (R. 27, 28) has not yet been reported.

JURISDICTION

The order of the District Court sustaining the demurrer to the joint indictment was entered June 23, 1938 (R. 28). The appeal to this Court was applied for and allowed on July 20, 1938 (R. 29). The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345).

An order was entered by this Court on October 10, 1938, noting probable jurisdiction.[1]

QUESTION PRESENTED

The sole question presented on this appeal is whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellee is to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

STATUTE INVOLVED

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 [1]), are printed in the Appendix to the Government's brief in the case of *United States of America, Appellant,* v. *Midstate Horticultural Company, Inc., and Arpaxat Setro-*

[1] The order of October 10, 1938, reads as follows: "In these cases (the order being applicable also to two other cases, Nos. 286 and 295) probable jurisdiction is noted. Further consideration of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits." The appellees' motion to dismiss was based solely upon one of the two grounds included in their statement opposing jurisdiction filed August 3, 1938. Inasmuch as the order of October 10, 1938, noting probable jurisdiction, covers both grounds which appellees urged against jurisdiction and therefore also the sole ground urged in respect to the motion to dismiss, it is assumed that the only matter deferred to the hearing of this case on the merits is the motion to affirm. Since this motion is based upon a single ground going to the merits, separate consideration is deemed unnecessary.

kian, No. 286, which will be argued concurrently with the present case.

STATEMENT

The indictment (R. 2–23) in 26 counts, charges appellee with granting rebates and concessions in violation of Section 1 of the Elkins Act. Each count is identical in substance and, omitting certain details and formal allegations, alleges the following material facts obtaining during the period covered by the indictment:

(1) Appellee, a common carrier, in conjunction with other common carriers by railroad, operated joint through routes for the transportation of property from certain points in California, through the Eastern District of Pennsylvania, to Manhattan Produce Yards in New Jersey.

(2) These common carriers published tariffs naming rates for the transportation of carload shipments of grapes over the above routes, and specifying those rates to be 173 cents per 100 pounds, at a minimum carload weight of 20,000 pounds.

(3) These common carriers on a certain date did transport for Midstate Horticultural Company, Inc., as consignor, a carload shipment of grapes from one of the California points named, over their joint through route as specified, to Manhattan Produce Yards, where the property was delivered to the consignee and the published freight charges col-